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NO. 82-458

In the

Supreme Court of the United States

OCTOBER TERM, 1982

TULARE LAKE CANAL COMPANY AND TULARE LAKE BASIN WATER STORAGE DISTRICT,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Brief on Behalf of North Kern Water Storage District, The City of Bakersfield, Buena Vista Water Storage District, Kern Delta Water District, Rosedale-Rio Bravo Water Storage District, Kaweah Delta Water Conservation District, Lower Tule River Irrigation District, Porterville Irrigation District and Vandalia Irrigation District, Amici Curiae, in Support of the Petition for a Writ of Certiorari

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This brief is filed on behalf of the nine *amici curiae* named above with the written consents of all of the parties to the proceeding.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit to which the pending Petition for a Writ of Certiorari is addressed is *United States v. Tulare Lake Canal Company* (1982), 677 F.2d 713, herein for convenience called "Tulare II". A copy of the Opinion in *Tulare II* is included as Exhibit A in the Appendix to the Petition for a Writ of Certiorari. The earlier Opinion of

the Court of Appeals for the Ninth Circuit in this same litigation, herein for convenience called "Tulare I", is *United States v. Tulare Lake Canal Company* (1976), 535 F.2d 1093.

INTRODUCTION

Twice in the last four years it has been necessary for the Supreme Court of the United States to correct errors of the Court of Appeals for the Ninth Circuit in the interpretation and application of the provisions of the Federal Reclamation Laws (Reclamation Act of June 17, 1902, 32 Stat. 388, and acts supplementary thereto and amendatory thereof, codified in 43 U.S. Code § 371 et seq.). Unfortunately, the Court of Appeals for the Ninth Circuit has not understood these "messages" from the Supreme Court and has persisted in its erroneous construction of the Federal Reclamation Laws. It is once more necessary, therefore, for this Court to "straighten out" the Ninth Circuit in its interpretation of the Reclamation Laws.

The first such "message" to the Ninth Circuit was the Supreme Court's Opinion in *California v. United States* (1978), 438 U.S. 645, involving the Reclamation Project known as New Melones Dam on the Stanislaus River in California. The Court of Appeals for the Ninth Circuit had held, in *United States v. California* (1977), 558 F.2d 1347, that in operating the Project the Secretary of the Interior need not comply with conditions imposed by the California State Water Resources Control Board. The Supreme Court reversed, and squarely held that Congress had, in Section 8* of the Reclamation Act, directed the Secretary of the Interior to observe and comply with state water laws in all cases except those in which Congress had "clearly", "explicitly" or "specifically" directed the Secretary of the Interior to do otherwise.

The Supreme Court sent the case back to the Ninth Circuit for further proceedings to determine which, if any, of the conditions imposed by the State Water Resources Control Board were in conflict with clear, explicit or specific Congressional directives.

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* Copies of this and other sections of Federal law involved herein appear in the Appendix.

In 1980 the Supreme Court delivered its second "message" to the Ninth Circuit in *Bryant v. Yellen* (1980), 447 U.S. 352. The Ninth Circuit had held that the acreage limitation provisions* of the Federal Reclamation Laws applied to the lands within the Imperial Irrigation District in Imperial County, California, even though such lands had pre-project water rights. *(United States v. Imperial Irrigation District* (1977), 559 F.2d 509 and (1979) 595 F.2d 524 and 525).

The Supreme Court again reversed the Ninth Circuit. It held that Section 6 of the Project Act directing that the Project works be used, among other things, for "satisfaction of present perfected rights" prohibited the Secretary of the Interior from interfering with the pre-existing water rights by imposing the acreage limitation provisions of Reclamation Law upon the use of water.

The Supreme Court also stressed the facts, discussed but brushed aside by the Ninth Circuit (559 F.2d 536-540), that before agreeing to the Project contract the District had been assured by the Secretary of the Interior that the acreage limitation did not apply to lands which already had a valid, vested water right, that the parties had negotiated and concluded their contract on that basis, and that this continued to be the official interpretation of the law for over thirty years thereafter, until it was repudiated in 1964.

The significance for this litigation of these two messages from the Supreme Court, which will be explained in detail below, was called to the attention of the Court of Appeals for the Ninth Circuit in appropriate petitions and briefs, but that Court's Opinion in *Tulare II* demonstrated either that the Court did not understand the messages or that it considered them irrelevant.

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* Limiting to 160 acres the area of land in a single ownership which may receive project water (Sec. 5 of the 1902 Act, 32 Stat. 389, and Sec. 46 of the Omnibus Adjustment Act of 1926, 44 Stat. 649).

PRIOR PROCEEDINGS

This extremely protracted litigation is a "test case" to determine answers to the following two questions of Federal law:

First: Are the provisions of Federal Reclamation Law, and particularly the so-called acreage limitation provisions, applicable to dam-and-reservoir flood control projects, constructed by the Army Corps of Engineers pursuant to the Flood Control Act of 1944 (58 Stat. 887) and subsequent statutes, which are utilized for the regulatory storage of privately-owned irrigation water supplies?

Second: If the acreage limitations are applicable to such a project, do the limitations continue to apply after the landowners have reimbursed the United States in full for the portion of the capital cost of the project allocated by the United States to the landowners who use the project facilities for storage of their privately-owned irrigation water?

The project selected for this "test case" is the Pine Flat Project constructed by the Corps of Engineers on the Kings River in California pursuant to Section 10 of the Flood Control Act of 1944 (58 Stat. 887 at 901). The Project consists of a dam and reservoir on the main stem of the Kings River for the primary purpose of impounding the springtime flood waters, and thereby preventing extensive downstream flood damage. When space in the reservoir is not needed for flood protection it is available for the temporary storage of privately-owned water. Such storage is of value to the water right owners because it enables them to use the water for irrigation of their crops during the hot summer months when the natural flow of the stream is very low.

The Pine Flat Project was completed in 1954. For several years thereafter the irrigation districts and other entities owning water rights on Kings River negotiated with the United States for a contract to utilize the space in the reservoir for temporary, regulatory storage of their water. During these negotiations the water right owners were repeatedly assured by the Department of the Interior that the acreage limitation provisions would not apply to any contracting entity which paid the United States a "lump sum" of cash equal to its share of the portion of the construction cost allocated by the United States to "irrigation benefits". In December, 1961 the Department repudiated its prior interpreta-

tion of Reclamation Law on this point and declared that the limitations would continue to apply after such a payment. The Department agreed, however, to submit this question, and also the question whether Federal Reclamation Law applied to the Project at all, to the Federal courts for determination; hence this "test case", which was commenced in 1963.

The irrigating entity chosen for the test case was Tulare Lake Canal Company, a mutual water company organized under California law, which had a long-standing, vested water right on Kings River. The company executed a contract with the United States under which it acquired a permanent right to store its irrigation water in the Pine Flat Reservoir, whenever space might be available, and in return the company immediately paid the United States in cash for the company's share of the portion of the construction cost of the Project which the government allocated to "irrigation benefits".

After a lengthy trial the United States District Court for the Eastern District of California in 1972 rendered judgment in favor of the Canal Company on both issues, holding that the Federal Reclamation Laws did not apply to the Pine Flat Project, and that even if they did apply, the Canal Company's immediate payment in full of its share of the construction cost terminated the applicability of the acreage limitation provisions (*United States v. Tulare Lake Canal Company* (1972), 340 F.Supp. 1185). The Court's judgment was supported by detailed and extensive Findings of Fact and Conclusions of Law, a copy of which is included in the Appendix attached to the Petition for a Writ of Certiorari herein.

Because the District Court decided in favor of the Canal Company on statutory grounds, the Court did not reach the so-called constitutional issues which were raised by the Canal Company's pleadings. Those issues were reserved for later consideration if need be.

On appeal by the United States, the Court of Appeals for the Ninth Circuit reversed the District Court in 1976, deciding both

of the crucial issues in favor of the United States (*Tulare I*, 535 F.2d 1093). Petitions for Writs of Certiorari were denied, though Mr. Justice Powell would have granted the Writs (429 U.S. 1121). Petitions for Rehearing were likewise denied (430 U.S. 976).

The litigation was then returned to the District Court for trial and determination of the constitutional issues. The District Court granted summary judgment in favor of the United States on those issues in 1977 without a written opinion. Tulare Lake Canal Company promptly appealed that decision to the Court of Appeals for the Ninth Circuit.

In November, 1979 Tulare Lake Canal Company filed with the Court of Appeals a petition for recall of the mandate which that Court had issued following its decision in *Tulare I*. The basis of the petition was that the Court's decision in *Tulare I* was inconsistent with the subsequent decision of the Supreme Court in the above-mentioned case of *California v. United States*, 438 U.S. 645. In 1980, in response to a request of the Court of Appeals, the parties filed supplemental briefs with regard to the effect of the Supreme Court's decision in *Bryant v. Yellen*, 447 U.S. 352.

The appeal on the constitutional issues and the Petition for Recall of Mandate were consolidated for hearing in the Court of Appeals. They were orally argued and submitted on November 13, 1980 and decided in the Government's favor in the above-mentioned *Tulare II* Opinion on May 17, 1982 (677 F.2d 713). A rehearing was denied June 29, 1982.

THE INTERESTS OF THE AMICI CURIAE

Each of the nine *amici curiae* has a substantial interest in storing its privately-owned irrigation water in a "dam-and-reservoir" flood control project constructed by the Corps of Engineers under Section 10 of the 1944 Flood Control Act. The Projects are the Isabella Project on Kern River, the Terminus Project on the Kaweah River, and the Success Project on the Tule River, all in

California. Each of these projects is similar, both in its physical characteristics and in its legal status, to the Pine Flat Project which is the subject of this litigation.

All of the *amici curiae* are public entities organized under the laws of California. Three of them are water storage districts, three are irrigation districts, one is a water district, one is a water conservation district, and one is a city.

Each of these public entities has long-vested rights to the diversion and distribution of waters of the river on which one of these Projects was built. Each entity's water right was perfected and vested under California law long prior to construction of the project. Some of the lands in each service area are held in ownerships exceeding 160 acres per owner. Each entity owns and operates its own facilities, built many years ago without government assistance, financial or otherwise, for diverting its water from the stream channel, transporting the water to its service area, and distributing the water to the farmers.

Eight of the entities have rights, under contracts with the United States, to store their own irrigation water temporarily in the upstream flood control reservoirs when space therein is not needed for flood protection. The other entity (Rosedale-Rio Bravo Water Storage District) may in the future acquire a right to do so.

Each *amicus curiae* has an obvious and substantial interest in the outcome of this litigation. Each of them endorses and supports the Petition for a Writ of Certiorari herein.

Obtaining the correct answers to the two questions posed by this "test case" (*supra*, p. 4) is clearly of the utmost importance to these *amici curiae*.

REASONS FOR GRANTING A WRIT OF CERTIORARI
SUMMARY OF ARGUMENT

A Writ of Certiorari should be granted for each of the following reasons:

First: The Court of Appeals for the Ninth Circuit has decided

important questions of Federal law which have not been but should be settled by this Court. The importance of the two questions decided in this "test case" cannot be overstated. As indicated above, they are of vital importance to these *amici curiae.* Moreover, they are of equally vital importance to the owners of millions of acres of irrigated land in other Federal project service areas. The first question is important to all landowners throughout the entire country whose irrigation water is temporarily stored or regulated in flood control reservoirs constructed by the Corps of Engineers under the 1944 Flood Control Act and subsequent statutes. The second question is important to the same landowners and also to all landowners in the service areas of all Reclamation projects throughout the Western states.

Second: The Court of Appeals has decided Federal questions in ways which conflict with applicable decisions of this Court.

In *California v. United States, supra,* the Supreme Court held that in administering the Federal Reclamation Laws the Secretary of the Interior must comply with state laws regarding the appropriation, distribution and use of water unless the Congress "clearly", "explicitly" or "specifically" has directed the Secretary to do otherwise.

In *Tulare I* the Ninth Circuit devoted 23 pages of its printed Opinion to concluding that Congress intended Reclamation Law to apply to the Pine Flat Project on Kings River, in violation of state law. This fact alone—the very length of the Court's analysis of Congressional intent—demonstrates that the Congressional intent to that effect certainly was not "clear", "explicit", or "specific". In *Tulare II* the Ninth Circuit did not re-examine the issue in the light of the Supreme Court's mandate in *California.*

Deciding that the acreage limitation provisions of reclamation laws survive the completion of payment by the landowners of their allocated share of the construction costs of the Project, took the Court 26 pages of its Opinion in *Tulare I.* It is obvious that there was no "clear", "explicit" or "specific" Congressional directive to apply the acreage limitation, in conflict with state law, after completion of the payment of construction costs.

Both of these conclusions are in conflict with the Supreme Court's mandate in *California v. United States* that State law must be obeyed in administering Federal Reclamation Law in the absence of a *clear, explicit* or *specific* Congressional directive to do otherwise.

In holding that the *general* provisions of Section 8 of the 1944 Flood Control Act override the *specific provisions* authorizing the Kings River Project in Section 10 of the same Act, the Ninth Circuit's decision was squarely in conflict with decisions of this Court holding that specific terms in a statute prevail over general language in the same statute.

In *Bryant v. Yellen, supra,* the Supreme Court held that Section 6 of the Boulder Canyon Project Act requires the Project to be operated so as not to interfere with "present perfected water rights". The Ninth Circuit refused to follow that decision in construing the portion of Section 8 of the Federal Reclamation Act of 1902 which protects vested water rights in language even stronger than Section 6 of the Boulder Canyon Project Act.

Third: The Ninth Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

In neither *Tulare I* nor *Tulare II* did the Ninth Circuit make a single reference to the Findings of Fact of the District Court, or refer to or discuss the testimony of a single witness or the contents of any of the 700 exhibits. The Court ignored the record. Instead, the opinions give evidence of an enormous amount of independent research. Consequently the decisions rest in large part upon evidence not in the record and never subjected to analysis or debate by counsel for the respective parties.

Furthermore, the Opinions completely ignore the portion of the District Court's Findings of Fact which entitled the defendant to judgment as a matter of law because of its reliance, to its substantial detriment, upon assurances by top officials of the Department of the Interior that the acreage limitation provisions of Reclamation Law would cease to apply upon payment either

in a lump sum or in installments of the portion of the cost of the project allocated by the government to irrigation benefits.

In *Tulare II* the Court of Appeals overturned a District Court Finding of Fact without referring to it or reviewing the evidence on which it was based.

Finally, the Court misquoted a Federal statute.

ARGUMENT

Three of the "reasons" that will be considered by the Supreme Court in ruling on petitions for writs of certiorari, as delineated in Rule 17, are applicable here. Accordingly, quotations from Rule 17 will be used as the headings for the successive portions of our Argument.

1. The Court of Appeals "Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court" (Rule 17.1(c)).

Actually, the Ninth Circuit has decided *two* extremely important questions of Federal law, neither of which has been, but certainly should be, settled by the Supreme Court so that this "test case" will result in a final and conclusive decision of each question, applicable on a nation-wide basis.

The two questions are stated above at page 4. The Ninth Circuit answered both questions in the affirmative.

The practical effect of the Court's decision that the Federal Reclamation Laws apply to the Pine Flat Project on Kings River, is to present the owners of excess land* in the Project service area with this vexatious dilemma: either (1) they must sell their excess lands, and their water rights appurtenant thereto, at far less than fair market value, and retain the right to store their water in the Pine Flat Reservoir for only the remaining 160 acres per owner; or (2) they must forego the right to store their water for their excess lands in Pine Flat Reservoir and go back to pre-Project operations, allowing the water to flow through the Reservoir in the spring without storage, putting it in underground

* *I.e.*, lands in excess of 160 acres in a single ownership.

reservoirs and pumping it (or so much of it as does not seep away) back to the surface at great expense when needed for summertime irrigation.

The impact of this dilemma, and the excess landowner's probable response to it, are not difficult to imagine. Suppose a single individual owns 640 acres of irrigable land in the Project service area, together with a right to a sufficient quantity of Kings River water to irrigate all of the land. He will surely not decide to sell three-quarters of his farm together with the appropriate portion of his water right at far less than its real value, in order to store water for the remaining 160 acres in the Pine Flat Reservoir. Instead he will choose the second horn of the dilemma. He will allow his water for his 480 excess acres to flow through the Pine Flat Dam without storage during the spring run-off. He will put that water in spreading ponds, let it seep into the underground, and hope that most of it will remain under his land until the summer when he needs the water for irrigation on the excess land. He will then consume vast quantities of energy in pumping what water is left back up to the surface. The cost of the energy will add to his total cost of producing his crops, and to the price at which he will sell them.

Thus the Ninth Circuit would force the excess land owner either to sell his excess land at great financial sacrifice* or adopt a very inefficient, wasteful and expensive substitute for utilizing storage rights in Pine Flat Reservoir. The importance of this decision to the individual landowner in the Kings River Project area is obviously very great.

But worse than that, the Ninth Circuit's answer to the first question in this "test case" constitutes a precedent which applies to *all* owners of excess land in *all* service areas of *all* dam-and-reservoir flood control projects constructed by the Corps of

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* The Court actually stated that this was a purpose of the acreage limitation! At page 1121 of *Tulare I* the Court said: "Section 46 was intended to accomplish the redistribution of large privately owned tracts at prices substantially below the actual value of such lands at the time of sale."

Engineers under the 1944 Flood Control Act and subsequent statutes, in *all* parts of the country. It applies not merely to this one project in California, it applies to every such project in every state in the Union. For example, it applies to landowners whose water is temporarily stored in the flood control reservoirs on the Columbia River; it applies to water stored behind the flood control dams on the Missouri River; and it applies to water stored in Lake Okeechobee in Florida.

Obviously the decision has a shattering impact upon growers of agricultural products throughout the country.

The Ninth Circuit's answer to the second question also has far-reaching significance. It applies to all Reclamation projects in the Western states, and to all post-1944 dam-and-reservoir flood control projects in the entire country. In holding that the acreage limitation provisions of Reclamation Law continue to apply after the landowners in a given project have paid the government in full for their allocated share of the project cost, the Ninth Circuit invalidated the so-called "pay-out principle" which had been the official interpretation of Reclamation Laws for over 40 years. During that period all of the administrators of the Department of the Interior had successively and consistently held that completion of the payment of the allocated cost terminated the acreage limitation provision. The rationale for this principle was that compliance with the acreage limitation was the *quid pro quo* for the financial subsidy represented by the interest-free financing available to landowners who repay their share of the construction cost in installments over a 40-year period *without interest*. By paying his share in full at the time of contracting for the purchase of storage space, a landowner gives up the financial subsidy represented by interest-free financing, and in return, under the "pay-out" principle, he is relieved from the acreage limitations.

When Tulare Lake Canal Company made its contract for the purchase of storage space in Pine Flat Reservoir in December of 1963, the company paid the United States in cash for its share

(determined by the United States) of the cost of constructing Pine Flat Dam and Reservoir. The landowners in the company service area were assessed proportionately for the amount of this cash payment. The result of the Ninth Circuit's decision invalidating the "pay-out" principle is that although our hypothetical 640-acre owner has paid for the right to store water for 640 acres, he cannot store more than enough for 160 acres.

Again, the impact of the Ninth Circuit's answer to the second question goes far beyond the Kings River service area. It applies to all Reclamation projects in the Western states. Moreover, because of the Ninth Circuit's answer to the first question, it also applies to all dam-and-reservoir projects constructed by the Corps of Engineers under the 1944 and subsequent acts throughout the United States, far beyond the Ninth Circuit's jurisdiction.

That these two questions of Federal law are "important" has been demonstrated. They have not been "settled" by the Supreme Court. That they should be is obvious.

2. The Court of Appeals "Has Decided a Federal Question in a Way In Conflict With Applicable Decisions of This Court" (Rule 17.1(c)).

In four respects the Ninth Circuit decisions conflict with applicable decisions of the Supreme Court.

A. The imposition of acreage limitations upon the shareholders of a mutual water company, such as Tulare Lake Canal Company, is a violation of the California state laws which require such corporations to distribute their water to their shareholders in proportion to their respective share ownerships, regardless of the acreage of their landholdings (*Consolidated Peoples Ditch Company v. Foothill Ditch Company* (1928), 205 Cal. 54 at 63). If *Tulare I* and *Tulare II* become final, the Canal Company will be required to violate California law by withholding water from excess lands.

In *California v. United States, supra,* the Supreme Court held that in administering the Federal Reclamation Laws the Secretary of the Interior may violate State laws *only* when "clearly", "ex-

plicitly" or "specifically" directed by the Congress to do so. It took the Ninth Circuit 23 pages (1096-1118) of its printed Opinion and 88 footnotes (4 to 91) in *Tulare I*, and a great deal of independent research into legislative history, to divine a Congressional intent that Federal Reclamation Laws should apply to the Pine Flat Project. If that laboriously discovered Congressional intent had been "clear", "explicit" or "specific" the Court could have decided this question in half a page.*

This was called to the Court's attention in the briefs which preceded the Court's Opinion in *Tulare II*. In that Opinion the Court brushed this issue aside, saying that *California v. United States* itself held that the acreage limitation provisions of Reclamation Law were a clear, explicit and specific Congressional mandate to override conflicting State laws (677 F.2d 716-7). That, of course is not the question. The question is whether Congress clearly, explicitly or specifically directed that Federal Reclamation Laws *should apply to the Pine Flat Project*, thus requiring Tulare Lake Canal Company to violate State law in distributing water to its farmer-shareholders. That is the question which the Court discussed for 23 pages in *Tulare I* and did not address in *Tulare II*. Clearly, *Tulare II* is in conflict with the Supreme Court's Opinion in *California v. United States*.

B. In deciding that the acreage limitation provisions apply, in violation of State law, after completion of payment of the allocated share of construction costs, the Court devoted 26 pages of its Opinion in *Tulare I* to analyzing legislative history, administrative practices and all manner of collateral sources to arrive at

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* In contrast to this "laboriously discovered Congressional intent" is the very clear, explicit and specific Congressional directive that the New Melones Project (which was the subject of *California v. United States, supra*) should be subject to the Federal Reclamation Laws. The project originally had been authorized as a flood control project in the 1944 Flood Control Act (58 Stat. 887). In the River and Harbor Act of 1962 Congress modified the project and provided that upon its completion by the Corps of Engineers "the project shall become an integral part of the Central Valley project and be operated and maintained by the Secretary of the Interior pursuant to the Federal reclamation laws" (76 Stat. 1173 at 1191).

its interpretation of Congressional intent. If there had been a clear, explicit or specific Congressional directive to apply acreage limitation provisions, in violation of State law, after completion of payment of construction costs, the Court could have decided this question in the other half of the page.

This was pointed out in the petitions and briefs which the Court had before it when it issued its Opinion in *Tulare II*. Yet the *Tulare II* Opinion contains not one word of discussion of this issue. Thus, on this issue also, *Tulare II* is in conflict with the Supreme Court's Opinion in *California v. United States*.

C. The Supreme Court has repeatedly held that general language in a statute must yield to conflicting specific language in the same statute (*Townsend v. Little*, 1883, 109 U.S. 504 at 512; *Ginsberg & Sons, Inc. v. Popkin*, 1932, 285 U.S. 204 at 208; and *Morton v. Mancari*, 1974, 417 U.S. 535 at 550-551).

Section 8 of the 1944 Flood Control Act is a provision, which the Court of Appeals itself called "general in coverage", purporting, according to the Court, to make *all* flood control dams utilized for irrigation purposes subject to the Reclamation Laws (*Tulare II*, p. 1116). Section 10 of the same Act is a specific provision authorizing the Pine Flat Project and directing the Secretary of *War* (*not* the Secretary of the *Interior*) to make arrangements for payment to the United States "for conservation storage when used" (58 Stat. 901). In holding that the *general* provisions of Section 8 (as construed by the Court) prevail over the *specific* provision of Section 10, the Ninth Circuit clearly decided this case "in a way in conflict with applicable decisions" of the Supreme Court, cited above, holding that a *specific* provision must prevail over a conflicting *general* provision in the same statute.

D. In *Bryant v. Yellen, supra*, the Supreme Court had before it the question whether the acreage limitations provisions of Reclamation Law apply to the lands within the Imperial Irrigation District in California which had vested, pre-project water rights. The controlling statute was the Boulder Canyon Project (45 Stat. 1057), Section 14 of which provided that the Project was subject

to Federal Reclamation Law and Section 6 of which directed that the Project facilities were to be used in part for "satisfaction of present perfected rights" to the diversion and use of waters of the Colorado River. The Supreme Court held, as noted above, that this mandate to satisfy perfected water rights prohibited any interference with or impairment of those rights by the enforcement of the acreage limitation provisions of Reclamation Law.

Section 8 of the Reclamation Act of 1902 contains even stronger language protecting perfected water rights:

> "Nothing in this Act shall * * * in any way interfere with the laws of any State * * * relating to the control, appropriation, use, or distribution of water used in irrigation, *or any vested right acquired thereunder* * * *." (Emphasis supplied)

Yet the Circuit Court in *Tulare II* held that the imposition of acreage limitation provisions did not interfere with Tulare Lake Canal Company's water right which had vested under State law long prior to the authorization of the Pine Flat Project (677 F.2d at 718). This decision is in direct conflict with the Supreme Court's holding that the imposition of acreage limitation provisions in the Imperial Irrigation District *would* interfere with the District's "present perfected right".

3. The Court of Appeals "Has So Far Departed from the Accepted and Usual Course of Judicial Proceedings * * * As to Call for an Exercise of This Court's Power of Supervision" (Rule 17.1(a)).

A. During the lengthy trial of this case in the District Court over 700 documents were introduced in evidence as exhibits, 12 witnesses testified in person, and 918 pages of reporter's transcript were produced. Following the trial the District Court in January, 1972 issued a brief Memorandum Opinion and Order (340 F.Supp. 1185) and made elaborate Findings of Fact containing 27 paragraphs, and specific Conclusions of Law.

The Opinions of the Court of Appeals for the Ninth Circuit in *Tulare I* and *Tulare II* contain not a single reference to a single Finding of Fact or a single Conclusion of Law or a single citation to the record! Instead the Court's Opinions contain innumerable references to collateral sources, including more than a dozen references to the voluminous writings of Professor Paul S. Taylor, who is an economist, not a lawyer, and is noted as an ardent and articulate crusader for *extending* the acreage limitation provisions of Reclamation Law (see, for example, the reference in footnote 109 at page 1123 of *Tulare I* to Professor Taylor's contention that the 160-acre limitation should be perpetual).

The length of *Tulare I*, its scholarly style, its inherent plausibility, and its 201 footnotes give clear evidence of an enormous amout of independent research, extending far beyond the record and the briefs of the parties. The decision rested in large part upon evidence not in the record and never subjected to analysis or debate by counsel. The Opinion is an elaborate, argumentative, dissertation based largely upon original research by the Court, or by someone else, without any reference to the record in the case before it. In truth, the Court ignored the record.

This is not the "accepted and usual" function of an appellate court. On the contrary, it is similar to the conduct of the Court of Appeals for the Eighth Circuit which the Supreme Court criticized in *E. I. du Pont de Nemours and Company v. Collins* (1977), 432 U.S. 46 at 57 in the following language:

> "We note that after receiving briefs and hearing oral argument, the Court of Appeals***undertook the unique appellate procedure of employing a university professor to assist the court in understanding the record and to prepare reports and memoranda for the court. Thus, the reports relied upon by that court included a variety of data and economic observations which had not been examined and tested by the traditional methods of the adversary process."

B. In another respect the Ninth Circuit flagrantly departed from "the accepted and usual course of judicial proceedings": it ignored the Findings of Fact which established an entirely independent and compelling ground for the judgment in favor of

Tulare Lake Canal Company, namely, the Company's defense of its detrimental reliance upon the government's assurances that by "paying out" its share of the Project cost the Company could relieve itself of the acreage limitations. The Findings clearly established that the Company and other Kings River interests had been repeatedly assured by the Department of the Interior that according to the official interpretation of the Federal Reclamation Laws, the payment in full of the Company's share of the allocated cost would relieve the Company and its shareholders of the impact of the acreage limitation provisions, that the Company had relied upon these assurances to its substantial detriment, and that to permit the government to change this interpretation of Reclamation Law would seriously prejudice the Company (Findings 24, 25 and 26; Pet. App. pages 17-19). In Finding 26 the Court said:

> "The Court is not aware of a clearer case of substantial reliance by citizens upon the Government's contemporaneous and long-standing administrative interpretation and application of federal law * * *."

The attention of the Court of Appeals was repeatedly directed to this defense, but the Court ignored it.

It is extraordinary that the Court of Appeals for the Ninth Circuit should ignore this defense of reliance, for that Court itself has repeatedly held in recent years that when a citizen has been given and has relied upon assurances by government officials as to interpretations of Federal law, those assurances cannot later be repudiated if to do so would substantially injure the citizen. In the case of *Brandt v. Hickel* (1970), 427 F.2d 53 at 57, for example, the Court of Appeals for the Ninth Circuit put the matter very succinctly:

> "To say to these appellants, 'The joke is on you. You shouldn't have trusted us,' is hardly worthy of our great government."

The failure of the Court of Appeals to deal with this defense of reliance must mean that the Court has no answer to it.

C. Another of the Ninth Circuit's egregious departures from

"the accepted and usual course of judicial proceedings" is its overturning of a clear Finding of Fact without referring to the Finding or examining the evidence in the record on which it was based. At page 719 of *Tulare II* is a bald statement that "the Pine Flat Project did involve a Federal subsidy". This statement is a flat contradiction of the District Court's Finding of Fact No. 7 (page 4 of the Appendix to the Petition herein). This Finding is not even mentioned, much less discussed, in the Court's Opinion. The circumstance that the Court made a statement contradicting a Finding of Fact, without mentioning the Finding or reviewing the evidence supporting it, indicates that the author of the Opinion did not realize the Finding existed, and suggests that he had never even read the Findings of Fact, or if he had he promptly forgot what was in them.

D. A final example: In *Tulare II* the Court misquoted a Federal statute. At page 715 the Court said:

> Section 8 of the 1944 [Flood Control] Act provides that dams such as Pine Flat shall be operated 'under the provisions of the federal reclamation laws.'"

The portion of Section 8 to which the Court referred reads:

> "SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes."

The phrase quoted by the Court ("under the provisions of the Federal reclamation laws") refers *only* to the construction, operation and maintenance of such *additional works* (for example, diversion works, canals and ditches) as the Secretary of the Interior might deem necessary for irrigation purposes. No such additional works have been or ever will be constructed by the Secretary of the Interior in connection with the Pine Flat Project. All necessary di-

version works, canals and ditches had been constructed by the water users, with their own funds, long before Pine Flat Dam was authorized, and the Secretary of the Interior has never sought authority to construct any "additional works" at the Project (Findings 10 and 12, Pet. App. 6-9).

To say, as the Court did, that the quoted phrase applies to the Pine Flat Dam is a gross distortion of the language of the statute.

* * *

Such extreme departures from the "accepted and usual course of judicial proceedings" suggest that *Tulare I* and *Tulare II* are an example of what is sometimes called "result-oriented judicial activism". In any event, the case cries for the Supreme Court's exercise of its "power of supervision" (Rule 17.1(a)).

CONCLUSION

Amici Curiae submit that a Writ of Certiorari should issue herein, *first* because the Court of Appeals for the Ninth Circuit has decided extremely important questions of Federal law which have not been, but should be, settled by the Supreme Court; *second*, because the decision interpreting Federal law is in conflict with applicable decisions of the Supreme Court; and *third* because the Court of Appeals has departed so far from the accepted and usual course of judicial proceedings as to call for the exercise of the Supreme Court's power of supervision.

Dated: October 13, 1982.

Respectfully submitted,

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Appendix

COPIES OF SECTIONS OF FEDERAL STATUTES INVOLVED HEREIN

RECLAMATION ACT OF 1902 (32 Stat. 388):

Section 5

Section 8

OMNIBUS ADJUSTMENT ACT OF 1926 (44 Stat. 636):

Section 46

BOULDER CANYON PROJECT ACT (45 Stat. 1057):

Section 6

Section 14

FLOOD CONTROL ACT OF 1944 (58 Stat. 887):

Section 8

Section 10 (Preamble and paragraph authorizing the Kings River Project)

Reclamation Act of 1902 (32 Stat. 388)

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands

entered under this Act.

(32 Stat. 389)

SEC. 8. That nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: *Provided,* That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

(32 Stat. 390)

Omnibus Adjustment Act of 1926 (44 Stat. 636)

SEC. 46. No water shall be delivered upon the completion of any new project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district or irrigation districts organized under State law providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works during the time they are in control of the United States, such cost of constructing to be repaid within such terms of years as the Secretary may find to be necessary, in any event not more than forty years from the date of public notice hereinafter referred to, and the excution of said contract or contracts shall have been confirmed by a decree of a court of competent jurisdiction. Prior to or in connection with the settlement and development of each of these projects, the Secretary of the Interior is authorized in his discretion to enter into agreement with the proper authorities of the State or States wherein said projects or divisions are located whereby such State or States shall cooperate with the United States in promoting the

settlement of the projects or divisions after completion and in the securing and selecting of settlers. Such contract or contracts with irrigation districts hereinbefore referred to shall further provide that all irrigable land held in private ownership by any one owner in excess of one hundred and sixty irrigable acres shall be appraised in a manner to be prescribed by the Secretary of the Interior and the sale prices thereof fixed by the Secretary on the basis of its actual bona fide value at the date of appraisal without reference to the proposed construction of the irrigation works; and that no such excess lands so held shall receive water from any project or division if the owners thereof shall refuse to execute valid recordable contracts for the sale of such lands under terms and conditions satisfactory to the Secretary of the Interior and at prices not to exceed those fixed by the Secretary of the Interior; and that until one-half the construction charges against said lands shall have been fully paid no sale of any such lands shall carry the right to receive water unless and until the purchase price involved in such sale is approved by the Secretary of the Interior and that upon proof of fraudulent representation as to the true consideration involved in such sales the Secretary of the Interior is authorized to cancel the water right attaching to the land involved in such fraudulent sales: *Provided further,* That the operation and maintenance charges on account of lands in said projects and divisions shall be paid annually in advance not later than March 1. It shall be the duty of the Secretary of the Interior to give public notice when water is actually available, and the operation and maintenance charges payable to the United States for the first year after such public notice shall be transferred to and paid as a part of the construction payment.
(44 Stat. 649)

Boulder Canyon Project Act (1928—45 Stat. 1057)

SEC. 6. That the dam and reservoir provided for by section 1 hereof shall be used: First, for river regulation, improvement of navigation, and flood control; second, for irrigation and domestic uses and satisfaction of present perfected rights in pursuance of

Article VIII of said Colorado River compact; and third, for power. The title to said dam, reservoir, plant, and incidental works shall forever remain in the United States, and the United States shall, until otherwise provided by Congress, control, manage, and operate the same, except as herein otherwise provided: *Provided, however,* That the Secretary of the Interior may, in his discretion, enter into contracts of lease of a unit or units of any Government-built plant, with right to generate electrical energy, or, alternatively, to enter into contracts of lease for the use of water for the generation of electrical energy as herein provided, in either of which events the provisions of section 5 of this Act relating to revenue, term, renewals, determination of conflicting applications, and joint use of transmission lines under contracts for the sale of electrical energy, shall apply.

The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

The Federal Power Commission is hereby directed not to issue or approve any permits or licenses under said Federal Water Power Act upon or affecting the Colorado River or any of its tributaries, except the Gila River, in the States of Colorado, Wyoming, Utah, New Mexico, Nevada, Arizona, and California

until this Act shall become effective as provided in section 4 herein.

(45 Stat. 1061)

SEC. 14. This Act shall be deemed a supplement to the reclamation law, which said reclamation law shall govern the construction, operation, and management of the works herein authorized, except as otherwise herein provided.

(45 Stat. 1065)

Flood Control Act of 1944 (58 Stat. 887)

SEC. 8. Hereafter, whenever the Secretary of War determines, upon recommendation by the Secretary of the Interior that any dam and reservoir project operated under the direction of the Secretary of War may be utilized for irrigation purposes, the Secretary of the Interior is authorized to construct, operate, and maintain, under the provisions of the Federal reclamation laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto), such additional works in connection therewith as he may deem necessary for irrigation purposes. Such irrigation works may be undertaken only after a report and findings thereon have been made by the Secretary of the Interior as provided in said Federal reclamation laws and after subsequent specific authorization of the Congress by an authorization Act; and, within the limits of the water users' repayment ability such report may be predicated on the allocation to irrigation of an appropriate portion of the cost of structures and facilities used for irrigation and other purposes. Dams and reservoirs operated under the direction of the Secretary of War may be utilized hereafter for irrigation purposes only in conformity with the provisions of this section, but the foregoing requirement shall not prejudice lawful uses now existing: *Provided*, That this section shall not apply to any dam or reservoir heretofore constructed in whole or in part by the Army engineers, which provides conservation storage of water for irrigation purposes.

(58 Stat. 891)

SEC. 10. That the following works of improvement for the benefit of navigation and the control of destructive flood waters and other purposes are hereby adopted and authorized in the interest of the national security and with a view toward providing an adequate reservoir of useful and worthy public works for the post-war construction program, to be prosecuted under the direction of the Secretary of War and supervision of the Chief of Engineers in accordance with the plans in the respective reports hereinafter designated and subject to the conditions set forth therein: *Provided*, That the necessary plans, specifications, and preliminary work may be prosecuted on any project authorized in this Act to be constructed by the War Department during the war, with funds from appropriations heretofore or hereafter made for flood control, so as to be ready for rapid inauguration of a post-war program of construction: *Provided further*, That when the existing critical situation with respect to materials, equipment, and manpower no longer exists, and in any event not later than immediately following the cessation of hostilities in the present war, the projects herein shall be initiated as expeditiously and prosecuted as vigorously as may be consistent with budgetary requirements: *And provided further*, That penstocks and other similar facilities adapted to possible future use in the development of hydroelectric power shall be installed in any dam authorized in this Act for construction by the War Department when approved by the Secretary of War on the recommendation of the Chief of Engineers and the Federal Power Commission.
(58 Stat. 891)

* * * *

The project for flood control and other purposes for the Kings River and Tulare Lake Basin, California, is hereby authorized substantially in accordance with the plans contained in House Document Numbered 630, Seventy-sixth Congress, third session, with such modifications thereof as in the discretion of the Secretary of War and the Chief of Engineers may be advisable at an estimated

cost of $19,700,000: *Provided*, That the conditions of local cooperation specified in said document shall not apply: *Provided further*, That the Secretary of War shall make arrangements for payment to the United States by the State or other responsible agency, either in lump sum or annual installments, for conservation storage when used: *Provided further*, That the division of costs between flood control, and irrigation and other water uses shall be determined by the Secretary of War on the basis of continuing studies by the Bureau of Reclamation, the War Department, and the local organizations.

(58 Stat. 901)